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No. 00-1146

In the
Supreme Court of the United States

THE STEEL COMPANY, AKA CHICAGO STEEL AND PICKLING COMPANY,

Petitioner,

v.

CITIZENS FOR A BETTER ENVIRONMENT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND STATE OF CALIFORNIA AUTO DISMANTLERS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether prevailing defendants should be placed on an equal footing with prevailing plaintiffs in determining whether an award of attorney fees is "appropriate" under the fee-shifting provision of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA), 42 U.S.C. § 11046(f), and similarly worded fee-shifting provisions of other federal environmental statutes.

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I

IDENTITY AND INTERESTS OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation and the State of California Auto Dismantlers Association respectfully submit this brief amicus curiae in support of Petitioner, The Steel Company.[1] Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

Pacific Legal Foundation (PLF) is supported by thousands of citizens from coast to coast and is the largest and most experienced nonprofit public interest law foundation of its kind in America. PLF was founded in 1973 and provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedoms, and free enterprise. PLF litigates nationwide in state and federal courts and is directly affected by fee-shifting statutes.

In its fight to protect fundamental rights, PLF becomes involved in cases that raise important public policy considerations that may create significant legal precedents. Amicus participation is approved by a voluntary Board of Trustees where PLF's perspective will assist the court in resolving the underlying legal issues. PLF has a long-standing interest in environmental issues and has participated in this Court in numerous cases involving the interpretation of federal environmental laws.

The State of California Auto Dismantlers Association (Association) is a nonprofit organization with approximately 500 members and represents the interests of the 1,400 licensed auto dismantlers in the State of California. Licensed facilities

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[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae affirm that no counsel for any party in this case authored this brief in whole or in part and that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

are the only entities authorized to dismantle and salvage vehicles for the recovery and recycling of parts and metals and for properly disposing of the 300 pounds of toxins and hazardous materials in the typical vehicle.

In addition to its lobbying efforts, the Association provides services and training. Business and regulatory information is provided by the Association at conferences and through various publications. For example, the Association has put together an industry guide for complying with the storm water regulations under the Clean Water Act. For several years, the industry has worked hard to ensure compliance with the many environmental regulations that govern these licensed facilities. The industry's compliance with the state's general storm water permit is well documented.

However, these largely family owned businesses have recently been targeted by environmental activists with threats of litigation for supposed infractions under the Clean Water Act. These activists have sent California auto dismantlers scores of notices of intent to sue. These notices have cost the industry huge sums in legal fees and cash settlements.

The notices of intent to sue inform industry members that they are allegedly in violation of the Clean Water Act and have 60 days to comply. Such notices typically result in settlements with the environmental group for approximately $50,000 and few, if any, onsite environmental issues are addressed. The mere threat of taking a small business to federal court compels the business owner in most cases to seek a monetary settlement with the potential plaintiff.

The allegations in these notices are often vague to the point of unintelligibility. "Evidence" of failure to comply typically entails a mere picture of a puddle in the facility parking lot with an oil sheen on the top. Allegations of harm include claims that there "may be" fewer birds in the area of the facility than elsewhere and that boaters (miles away from the

inland facility) have gotten oil on their hands while untangling a propeller on their boat. The notices usually make no attempt to connect the alleged violations to the alleged harms. And while many of these cases could never prevail in court, the cost to defend against such accusations (without even the hope of a fee award) is more than the industry or a small family owned business can support. In some cases, these notices have resulted in the virtual confiscation of the business and even the personal assets of some individuals.

Therefore, the Association has a direct interest in this case that puts at issue the treatment of prevailing defendants under the fee-shifting provisions of environmental statutes. The Association, along with PLF's public policy perspective, will provide a necessary viewpoint on the issues presented in this case.

STATEMENT OF THE CASE

The Steel Company is a small, minority-owned steel manufacturer and pickler in Chicago, Illinois. The Company started in 1971 and employs about 55 people. The Company is subject to the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA) (42 U.S.C. § 11001, *et seq.*) that requires, among other things, the annual submission of chemical inventory and release forms to federal, state, and local entities.

In 1995, Citizens for a Better Environment (CBE), a large environmental citizen group, sent an EPCRA 60-day Notice of Intent to Sue to the United States Environmental Protection Agency (EPA), the state, and the Company alleging the Company had never filed the requisite forms. Before the 60-day notice period had run, the Company filed the forms with the EPA. EPA chose not to pursue any enforcement action but, notwithstanding the Company's remedial filing, CBE brought suit in the Northern District Court of Illinois seeking, among other things, civil penalties against the Company in excess of

$537,000,000. The district court dismissed the case but the Seventh Circuit reversed.

On certiorari, this Court held there was no ongoing dispute and, therefore, CBE lacked constitutional (Article III) standing to bring the suit. This was a watershed case in citizen-suit standing and was decided by a unanimous court.

On remand, The Steel Company sought attorneys' fees as a "prevailing party" in the amount of $270,000. EPCRA authorizes such fees:

> The Court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing party or the substantially prevailing party whenever the court determines such an award is appropriate.

42 U.S.C. § 11046(f).

Although this provision is party-neutral on its face, the Seventh Circuit applied a "double standard" ruling that while prevailing plaintiffs are presumptively entitled to attorney's fees, prevailing defendants must show the suit was "frivolous, unreasonable, or pursued in bad faith." Since the suit was deemed ill-advised but not frivolous, The Steel Company was denied fees.

The Steel Company has petitioned this Court to determine whether the fee-shifting provision of EPCRA, like that of approximately 40 other similar environmental statutes, requires equal treatment of prevailing defendants.

SUMMARY OF THE ARGUMENT

This Court has twice characterized the question of fee awards for prevailing defendants as an important question of federal law warranting review by this Court. Under the Civil Rights Act, this Court determined that Congress intended to

protect impecunious plaintiffs from large businesses and that the fee-award provision of that statute should be interpreted to favor plaintiffs. However, using an ad hoc analysis, this Court considered a "virtually identical" provision in the Copyright Act and determined that Congress intended to protect defendants as well as plaintiffs and that the Act required even-handed treatment of successful parties. But this Court has never determined whether a similar fee-shifting provision in the Emergency Planning and Community Right-To-Know Act, or any other environmental statute, must be interpreted to require a "dual" or even-handed approach to fee awards.

The lower court's reliance on *Pennsylvania v. Delaware Valley Citizens' Council*, for the position that this Court requires application of the "dual standard" of fee awards in environmental cases, is misplaced. That case did not raise the question of fee awards for prevailing defendants, but turned on whether prevailing plaintiffs were entitled to fees for administrative actions.

In *Fogerty v. Fantasy, Inc.*, this Court made clear that the meaning given a fee-shifting provision in a statute will be determined by a case-by-case analysis of the goals and objectives of the act. Unlike the Civil Rights Act, that this Court believed was designed to maximize private suits, EPCRA and similar environmental statutes were designed to encourage compliance and avoid litigation. Environmental plaintiffs are not "private attorneys general" in the make of a civil rights plaintiff. Rather, they serve only to supplement, and not replace, governmental enforcement.

Environmental plaintiffs are also not generally impecunious but run the gamut from corporate behemoths to those of small means. Environmental suits are often brought by well funded activists, like CBE in this case, against small, family owned businesses such as amici auto dismantlers who can ill afford to defend themselves in court. Because these

defendants may not even recoup the cost of successful litigation, under the lower courts' "dual standard" for environmental suits, they must either settle the case at great expense or close down their business. This standard promotes opportunistic litigation for economic gain but deters litigation of a meritorious defense.

Neither the language of EPCRA nor the legislative history hint that successful plaintiffs are to be treated differently than successful defendants. Therefore, this Court should grant the Writ of Certiorari to address this important question of federal law.

ARGUMENT

I

WHETHER A PREVAILING DEFENDANT MAY RECEIVE AN AWARD OF ATTORNEY'S FEES UNDER AN ENVIRONMENTAL STATUTE IS AN IMPORTANT QUESTION OF FEDERAL LAW

On two occasions, this Court addressed the question of whether attorney's fees should be allowed when the defendant is the prevailing party. In one case, the Court considered the question in the context of a civil rights suit; and, in the other, the Court considered the question in the context of a copyright infringement suit. In both instances, certiorari was expressly granted so that this Court could address "an important question of federal law." The question arises now in the context of an environmental suit and is no less important.

Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978), was a Title VII action. In 1972, Congress amended Title VII of the Civil Rights Act of 1964 authorizing the Equal Employment Opportunity Commission (EEOC) to sue in its own name on "charges pending with the Commission" on the effective date of the amendments. Relying on charges of racial discrimination filed

years earlier by Rosa Helm against her employer, Christiansburg Garment Company, the EEOC sued the company for unlawful employment practices. The company defended on grounds that the charges were not "pending" at the time the 1972 amendments took effect. The district court agreed and granted summary judgment for the company.

The company then petitioned for attorney's fees as a prevailing defendant under section 706(k) of Title VII. That section stated:

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-5(k).

Notwithstanding the party-neutral language of this provision, the district court ruled the company was not entitled to an award of attorney's fees because the EEOC's action in bringing the suit could not be "characterized as unreasonable or meritless." *Christenburg,* 434 U.S. at 415. A divided Fourth Circuit affirmed, and this Court "*granted certiorari to consider an important question of federal law.*" *Id.*

On certiorari, this Court adopted a "dual standard" for awarding attorney's fees in Title VII cases. That standard requires a district court to grant an award of attorney's fees to a prevailing plaintiff "in all but special circumstances" while denying attorney's fees to a prevailing defendant except upon a finding the action was "frivolous, unreasonable, or without foundation." *Id.* at 417-21.

Although this Court admonished against a "mechanical construction" of such provisions, and the Court found a unique set of "equitable considerations" to justify its new Title VII

fee-award standard, *id.* at 419, the Court's "dual standard" for civil rights cases became the de facto standard in some circuits for interpreting all similarly worded fee-shifting provisions. This became apparent in a subsequent case this Court considered called *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994).

In that case, Fogerty successfully defended a copyright infringement action brought against him by Fantasy, Inc., and filed for an award of attorney's fees as a prevailing defendant. The fee-shifting provision of the Copyright Act of 1976 was "virtually identical," *id.* at 522, to that found in Title VII.

Following this Court's ruling in *Christiansburg*, the district and appellate courts ruled Fogerty was not entitled to attorney's fees as a prevailing defendant in a copyright action. But this Court granted certiorari to once again "*address an important area of federal law,*" and reversed. 510 U.S. at 521.

It is clear from *Fogerty* that this Court has adopted an ad hoc approach to determining the appropriateness of a fee award for a prevailing defendant. In *Fogerty*, this Court went to great lengths to compare and contrast the Copyright and Civil Rights Acts and concluded the goals and objectives of the two Acts are not similar. *Id.* at 524. Most importantly, this Court concluded that "the policies served by the Copyright Act are more complex, more measured, than simply maximizing the number of meritorious suits for copyright infringement"—a feature of Title VII that this Court found decisive in *Christiansburg*. Consequently, this Court rejected the "dual standard" approach of *Christiansburg* in a copyright context and adopted an evenhanded approach; holding that "[p]revailing plaintiffs and prevailing defendants are to be treated alike" under the Copyright Act.

But in stark contrast to the thorough analysis this Court employed in *Fogerty* to determine the "goals and objectives" of the Copyright Act and, therefore, the propriety of a fee award

for prevailing defendants, the Seventh Circuit in this case adhered to the *Christiansburg* "dual standard" as a per se rule and summarily rejected The Steel Company's claim for $270,000 in attorney's fees. *See Citizens for a Better Environment v. The Steel Company*, 230 F.3d 923, 931 (7th Cir. 2000).

It is necessary, therefore, that this Court determine if the "goals and objectives" of the Emergency Planning and Community Right-To-Know Act, an environmental statute, are more like the Civil Rights Act of 1964, as interpreted by this Court in *Christiansburg*, or the Copyright Act of 1976, as interpreted by this Court in *Fogerty*.

II

CERTIORARI SHOULD BE GRANTED TO CLARIFY THIS COURT'S DECISION IN *PENNSYLVANIA v. DELAWARE VALLEY CITIZENS' COUNCIL* ON WHICH THE LOWER COURTS ERRONEOUSLY RELY TO DENY ATTORNEY'S FEES TO PREVAILING DEFENDANTS

The court below applied the "dual standard" for fee awards in this EPCRA case because it felt compelled by this Court's putative application of *Christiansburg* in *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546 (1986). But, that case provides no precedent for this case.

In *Pennsylvania*, the plaintiff, Delaware Valley Citizens' Council, sued the commonwealth for failure to implement a vehicle inspection and maintenance (I/M) program required by the Clean Air Act. Pursuant to a consent decree, Pennsylvania agreed to implement an I/M program in some counties. As a prevailing party under section 304(d) of the Act, the plaintiff sought and received fees and costs; not only for the cost of litigation, but also for monitoring Pennsylvania's performance under the consent decree and subsequent participation in related

rulemaking proceedings. Pennsylvania challenged the award of fees and costs related to plaintiff's administrative actions arguing the Act only authorized fee awards for the "costs of litigation." 478 U.S. at 557-58.

The primary question before this Court, therefore, and unlike the question in this case, was "whether the Clean Air Act, 42 U.S.C. § 7401, *et seq.*, authorizes attorney's fees awards [for prevailing plaintiffs] for time spent by counsel participating in regulatory proceedings." *Id.* at 548.

To address that question, this Court analogized to section 1988 jurisprudence:

> Several courts have held that, in the context of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, postjudgment monitoring of a consent decree is a compensable activity for which counsel is entitled to a reasonable fee .... Although § 1988 authorizes fees in "any action or proceeding" brought to enforce the Civil Rights Acts, and § 304(d) applies only to "any action" brought under the Clean Air Act, this distinction is not a sufficient indication Congress intended § 304(d) to apply only to judicial, and not administrative, proceedings.

Id. at 559 (citations omitted).

Therefore, in determining the propriety of a fee award for a prevailing plaintiff for work in post-litigation administrative proceedings, this Court stated that "we find no reason not to interpret both provisions governing attorney's fees in the same manner." *Id.* at 560. This Court did not address, however, the propriety of a fee award under the Clean Air Act, or any other statute, for a prevailing defendant. Nor did this Court imply that it had adopted the § 1988 "dual standard" as a general rule of applicability with respect to fee awards.

Nevertheless, the court below in the present case elevated this narrow opinion to a general and conclusive rule of law, encompassing all fee award questions arising under environmental, and presumably many other, fee-shifting statutes:

> *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 560, 92 L. Ed. 2d 439, 106 S. Ct. 3088 (1986), says that the fee-shifting provisions of environmental statutes that promote private enforcement should be applied "in the same manner" as § 1988, a statute covered by *Christiansburg's* asymmetric [dual standard fee award] approach.

Citizens for a Better Environment v. The Steel Company, 230 F.3d at 931.

Of course, this Court has made no such general pronouncement. Had it done so, it could not have come to an opposite conclusion later in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, wherein this Court determined that the fee-shifting provision in that case—which is "virtually identical" to the fee-shifting provision in *Christiansburg*, as well as in this case and most other environmental statutes—does not allow the "asymmetric" treatment of prevailing defendants the lower court maintains is now required by this Court under *Pennsylvania* and *Christiansburg*.

As Justice Thomas suggested in his concurring opinion in *Fogerty*, to the extent *Pennsylvania* and *Christiansburg* are read to "impose a 'dual' standard of recovery," they create a conflict with *Fogerty* and constitute a "dubious precedent." He warns against doing what the Seventh Circuit has done in this case in expanding the precedent "to its outer limits." *Fogerty*, 510 U.S. at 538-39.

According to Justice Thomas, the standard for interpretation "implicit in *Christiansburg*," and more express in

Fogerty, is to look at the "policy objectives and legislative history of the statute." It is apparent, therefore, that this Court has rejected a categorical interpretation of the various fee-shifting statutes in favor of a case-by-case analysis based on the goals and objectives of the particular act. But this Court has never considered the goals and objectives of EPCRA, or any other environmental statute, to determine whether that statute allows a fee award for a prevailing defendant. Nevertheless, the Seventh Circuit precedent of this case is likely to be applied by other courts in interpreting EPCRA, and similar environmental laws, without a Supreme Court pronouncement. Therefore, this Court should address the issue now.

It is noteworthy that this Court recently granted certiorari in a similar context to address the viability of the so-called "catalyst theory" of fee awards. Under that theory a plaintiff may obtain a fee award as a "prevailing party" by merely inducing a favorable change in behavior in the defendant without any ruling on the merits of the claim or an enforceable order. This theory was created by the lower courts and has not been squarely addressed by this Court. However, in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources* (on writ of certiorari, No. 99-1848), the Fourth Circuit ruled that this Court's decision in *Farrar v. Hobby*, 506 U.S. 103 (1992), precluded application of the theory.

Much like the Seventh Circuit's interpretation of *Pennsylvania* in this case, the Fourth Circuit in *Buckhannon* distilled a general rule from *Farrar* relating to the viability of the "catalyst theory," although this Court never addressed that theory in the *Farrar* case. This Court recently took the case up on review to clarify its decision in *Farrar* and to address an important question of federal law that requires a direct ruling by this Court. Likewise, this Court should grant review in this case to clarify its decision in *Pennsylvania* and to provide a direct ruling on whether EPCRA authorizes a fee award for a

prevailing defendant on an equal footing with a prevailing plaintiff—an important question of federal law.

III

IT IS IMPORTANT FOR THIS COURT TO CLARIFY THAT THE "GOALS AND OBJECTIVES" OF EPCRA SUPPORT AN AWARD OF ATTORNEY'S FEES FOR A PREVAILING DEFENDANT

The legislative policies behind EPCRA, and similar laws, suggest Congress intended an even-handed approach to fee awards in environmental suits. The citizen suit provisions of these statutes were designed to encourage compliance and deter, not promote, litigation. To ensure that the citizen suit provisions of federal environmental laws remain focused on achieving the purposes of these statutes, it is important for this Court to address the question of fee awards in this case.

In *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, this Court ruled that the purposes of the Copyright Act, unlike the Civil Rights Act in *Christiansburg*, required equal treatment of prevailing plaintiffs and defendants, although the fee-award provisions in both Acts were "virtually identical." In his concurrence, Justice Thomas noted:

> The Court recognizes the general principle that similar fee provisions are to be interpreted alike . . . but states that the principle does not govern this case because the factors that guided our interpretation in Christiansburg—the policy objectives and legislative history of the statute —do not support the adoption of a "dual" standard in this context.

510 U.S. at 537 (citation omitted).

Justice Thomas clearly disagreed with this approach. He urged the Court to rely on the plain meaning of the fee-shifting provisions and "acknowledge that *Christiansburg* mistakenly

cast aside the statutory language to give effect to [other] considerations." *Id.* at 538. Nevertheless, Justice Thomas recognized that the Court's analytical approach "implicit in *Christiansburg*"—whether to interpret a fee-shifting statute "in accordance with its plain meaning"—depends on the statute's policy objectives and legislative history. *Id.* at 537-38.

The considerations this Court found in *Christiansburg,* to justify ignoring the plain language of the statute and to disallow an award of attorney's fees for a prevailing defendant, were two-fold. First, this Court found that a Title VII plaintiff is the "chosen instrument" of Congress to vindicate the goals of the Act. *Christianburg*, 510 U.S. at 523. And second, this Court relied on the admittedly sparse legislative history for its conclusion that successful plaintiffs should be treated differently than successful defendants. *Id.*

But in *Fogerty*, this Court found no such considerations:

> The goals and objectives of the two Acts are . . . not completely similar. Oftentimes, in the civil rights context, impecunious "private attorney general" plaintiffs can ill afford to litigate their claims against defendants with more resources. Congress sought to redress this balance in part, and to provide incentives for the bringing of meritorious lawsuits, by treating successful plaintiffs more favorably than successful defendants in terms of the award of attorney's fees. The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public . . . . In the copyright context, it has been noted that "entities which sue for copyright infringement as plaintiffs can run the gamut from corporate behemoths to starving artists; the same is true for prospective copyright infringement defendants."

Id. at 524 (citation omitted).

The disparity in the goals and objectives between EPCRA and the Civil Rights Act are just as great. Environmental plaintiffs are not Congress' "chosen instruments" to vindicate the goals of the Act nor are they impecunious parties who can "ill afford to litigate their claims against defendants with more resources." To the contrary, the state and federal governments are the "chosen instruments" of Congress to enforce this and similar environmental laws, and it is often the plaintiffs, not the defendants, who have the greater resources. As in the copyright context, both plaintiffs and defendants run the gamut from corporate behemoths to those who barely make ends meet.

A. Private Plaintiffs Are Not Congress' "Chosen Instruments" to Enforce EPCRA

In crafting the citizen suit provision of environmental laws, Congress sought to "strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." *See Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989) (analyzing the legislative history of the citizen suit provision of the Clean Air Amendments of 1970, which served as the precursor to analogous citizen suit provisions in other environmental laws, including the Clean Water Act, the Resource Conservation and Recovery Act, and the Emergency Planning and Community Right-to-Know Act at issue in this case).

In furtherance of this goal, environmental plaintiffs are required to give 60-day notice of their intent to sue to the alleged violator and the federal and state governments. This Court stated in *Hallstrom*:

> Requiring citizens to comply with the [60-day] notice and delay requirements serves this congressional goal [of striking a balance] in two

> ways. First, notice allows Government agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits . . . . Second, notice gives the alleged violator "an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit."

Hallstrom, 493 U.S. at 29 (citing in part *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60 (1987)).

In *Gwaltney*, this Court considered whether the citizen suit provision in the Clean Water Act (CWA), which is strikingly similar to the citizen suit provision in EPCRA, authorized citizen suits for wholly past violations. This Court determined the Act did not confer such jurisdiction citing, among other things, the purpose of the citizen suit provision.

This Court reasoned that retroactive citizen suits would render incomprehensible the notice provision that requires citizens to give 60-day's notice of their intent to sue to the alleged violator as well as to the administrator of the EPA and the state. *Gwaltney*, 484 U.S. at 59. "If the Administrator or the State commences enforcement action within that 60-day period, the citizen suit is barred, presumably because governmental action has rendered it unnecessary." *Id.* According to this Court, it follows logically that "the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and, thus, likewise render unnecessary a citizen suit." *Id.* at 60. In a unanimous opinion, this Court stated: "If we assume, as respondents urge, that citizen suits may target wholly past violations, the requirement of notice to the alleged violator becomes gratuitous." *Id.*

This Court also pointed out that the bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than supplant

government action. *Id.* "Permitting citizen suits for wholly past violations of the Act could undermine the supplementary role envisioned for the citizen suit." *Id.* To illustrate this danger, this Court posed a hypothetical.

Suppose the administrator of the EPA identified a violator and issued a compliance order. *Id.* "Suppose further that the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take." *Id.* at 60-61. "If citizens could file suit, months or years later, in order to seek the civil penalties the Administrator chose to forego, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably." *Id.* at 61.

This Court concluded that to allow citizen suits for past violations would subvert the purpose of the Act and change the nature of the citizen's role from interstitial to potentially intrusive. *Id.* The Court stated: "We cannot agree that Congress intended such a result." *Id.*

This Court's rationale for limiting the scope of the citizen suit provision of the Clean Water Act applies equally to EPCRA which contains a nearly identical prohibition on citizen suits when the government acts. Therefore, unlike the "private attorneys general" in the Civil Rights Act, environmental plaintiffs are not Congress' "chosen instrument" for enforcing EPCRA. To the contrary, they are, at most, merely supplemental. The paramount objective of citizen suits under federal environmental statutes is to encourage compliance and assist, not replace, governmental law enforcement. That is the theme pervading this Court's ruling in *Gwaltney*.

The most logical reason for Congress to have included party-neutral fee award language in EPCRA, and other environmental laws, is not only to provide an incentive for citizens to

pursue meritorious claims but also to encourage defendants to litigate meritorious defenses. *See* Petition for Writ of Certiorari at 7.

The policies served by EPCRA are "more complex, more measured, than simply maximizing the number of meritorious suits" for environmental reporting violations. *Fogerty*, 510 U.S. at 526. As this Court recognized in *Fogerty*, statutes often have more than one goal and "a successful defense . . . may further the policies of the . . . Act every bit as much as a successful prosecution." 510 U.S. at 527.

This is particularly true in this case where The Steel Company's vigorous defense resulted in a landmark ruling decided by a unanimous Supreme Court. The statutory language and legislative history "give no hint that successful plaintiffs are to be treated differently than successful defendants." *Id.* at 522. Therefore, this Court should grant certiorari to elucidate the fee award provision of EPCRA.

B. The Plaintiffs in This Case, as in Many Environmental Suits, Are Well Financed and Do Not Warrant Special Protection or Incentives in the Way of Fee Awards

Unlike the impecunious plaintiffs this Court determined Congress sought to protect under the Civil Rights Act, which warranted special treatment in fee awards, the plaintiffs in environmental actions are often well-financed, while the defendant may be a party with few resources.

Certainly the plaintiff in this case is not impecunious. Citizens for a Better Environment boasts a membership reaching into the tens of thousands. According to its IRS (Form 990) filing for fiscal year 1999, plaintiff had revenues in excess of $2,000,000. This is typical of the activists groups filing environmental suits around the country. IRS filings for fiscal year 1999 show Defenders of Wildlife with revenues in excess of $19,000,000, and more than $14,000,000 in net assets.

Likewise, the Sierra Club Foundation had revenues over $26,000,000, and net assets over $41,000,000; the Natural Resources Defense Council had revenues over $36,000,000, and net assets over $53,000,000; and, the World Wildlife Fund had revenues over $111,000,000, and net assets over $133,000,000.

Environmentalism is "Big Business" and environmental litigation is a large and lucrative industry. Suits are often brought by large organizations against small, family owned businesses like amici auto dismantlers (for minor administrative infractions) who cannot afford to defend themselves in court. *See* Identity and Interests of Amici Curiae above. Even if these defendants win their case, under the "dual standard" for fee awards they will not be able to recoup even the cost of litigation. Instead, they are forced to settle the suit at great expense or, in the worst cases, to give up their business rather than pursue a meritorious defense.

The range of both plaintiffs and defendants under EPCRA, like the Copyright Act, runs the gamut from corporate behemoths to cash-strapped individuals. But because of the favorable fee-award treatment environmental plaintiffs receive in the courts, they have little to lose and much to gain by filing unnecessary actions; actions like the present where the violation was technical and caused no harm to the environment. This encourages opportunistic litigation for economic gain. Environmental plaintiffs can and do use the threat of a lawsuit to coerce lucrative settlements from alleged violators. CBE readily admits that those companies that don't settle will be "punished" with a lawsuit.

> In the event that CBE is unable to settle the matter, it files court actions seeking penalties to be paid to the United States Treasury to *punish* non-complying companies and other companies from ignoring EPCRA.

Opening Brief for Plaintiff-Appellant, Citizens for a Better Environment, in the United States Court of Appeals for the Seventh Circuit at 9-10 (original suit) (emphasis added).

But, as noted above, the paramount objective of citizen suits under EPCRA is to encourage compliance. Congress could not have intended this law to be used by private citizens for their own punitive and mercenary purposes.

It is critical that this Court clarify this important area of federal law and level the playing field. With an even-handed fee award standard, plaintiffs will be less likely to pursue unnecessary cases while defendants, sometimes impecunious defendants, are afforded an incentive to litigate meritorious defenses.

CONCLUSION

This Court has never determined whether the fee-shifting provision of EPCRA, or any other environmental statute, requires disparate or even-handed treatment of successful defendants. This is an important question of law warranting a Writ of Certiorari. Review should be granted.

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Respectfully submitted,

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